APPENDIX

The Federal Power Act (Act of August 26, 1935, c. 687, 49 Stat. 838; 16 U.S.C. 791 et seq.)

Section 3(8)

Section 3(8) of the Federal Power Act defines "navigable waters" as follows:

" 'Navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

Sec. 23(a) - U.S.C., Title 16, Sec. 816:

"Sec. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: PROVIDED, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of

the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing."

Sec. 23(b) - U.S.C. Title 16, Sec. 817:

"(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

Sec. 308(b) - U.S.C. Title 16, Sec. 825g(b):

"(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No in-

formality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act."

The Federal Water Power Act (Act of June 10, 1920, Chapt. 285, Sec. 23, 41 Stat. 1075, U.S.C., Title 16, Secs. 816, 817). (Before Amendment of 1935.)

"Sec. 23. That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: PROVIDED, That when application is made for a license under this section for a project or projects already constructed, the fair value of said project or projects, determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant, or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.

"That any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the com-

mission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

Revised Statutes, Sec. 3477 (10 Stat. 170, Title 31, U.S.C., Sec. 203).

"203. Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.* * *."

The Act of February 15, 1901, c. 372, 31 Stat. 790, U.S.C., Title 16, Sec. 79.

"Chap. 372 - An Act Relating to rights of way through certain parks, reservations, and other public lands.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water

conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: PROVIDED, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: PROVIDED FURTHER, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: AND PROVIDED FURTHER, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

By the Act of February 1, 1905, c. 288 (33 Stat. 628), the Secretary of Agriculture was authorized to issue such permits under the 1901 Statute for use of lands within national forests reserves.

REGULATIONS

Department of the Interior (March 1, 1913 - 41 L.D. 532 et seq.)

"Reg. 19. Violation by a final permittee of any of the provisions of these regulations, or of any of the conditions of a permit issued to him thereunder, shall be sufficient

ground for revocation of such permit; but attention is called to the statute under which these regulations are issued, which provides:

"That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or by his successor in his discretion.

"No permit will be deemed to be revoked except on the issuance by the Secretary of a specific order of revocation. Change of jurisdiction over lands from one executive department to another will not revoke but will change the administrative jurisdiction over a permit for the occupancy and use of such lands. The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act."

Department of Agriculture (Issued December 14, 1915).

"Reg. L-17. Permission to occupy and use National Forest lands may be transferred to a new permittee under the following conditions and not otherwise: The proposed transferee shall file with the district forester of the district in which the lands under permit are situated the decree, execution of judgment, will, contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also a written application for the transfer. A stipulation binding the proposed transferee to the performance of such of the old conditions and of such new and additional conditions as the Secretary may deem necessary will be prepared and submitted to the proposed transferee for execution and return to the district forester; and thereupon, if the Secretary approves of the transfer and issues a new permit, the transferee shall succeed to the rights and obligations of the original permittee, subject, however, to such new and additional conditions as shall have been embodied in said stipulation and permit."

"Reg. L-19. Violation by a final permittee of any of the

provisions of these regulations, or of any of the conditions of a stipulation executed by him or of a permit issued to him thereunder, shall be sufficient ground for revocation of such permit.

"No final permit will be deemed to be terminated except upon formal revocation thereof by the Secretary and until the permittee shall have had a reasonable time - not to exceed 90 days - within which to show cause why such revocation should not be made."

Distances up the Missouri River from its mouth to some of the points referred to in the record.

Location	*Mile*	*Location*	*Mile*
Mouth of River	0	Ryan	2249
Yellowstone River	1690	Site "C"	2251
Big Muddy Creek	1735	Crooked Falls	2254
Poplar River	1785	Rainbow Falls	2254
Redwater Creek	1787	Colters Fall	2254
Wolf Point, Mont.	1811	Rainbow Dam	2254
Wolf Creek	1817	Black Eagle Falls	2258
Little Porcupine Creek	1850	Black Eagle Dam	2258
Milk River	1866	Great Falls City	2260
Ft. Peck Dam	1878	Sun River	2261
Blackfoot Creek	1965	Smith River	2290
Trover Point	1975	Ulm	2292
Musselshell River	2004	Cascade	2316
Carroll, Mont.	2041	Half Breed Rapids	2327
Two Calf Island	2067	Dearborn River	2337
Zortman Ferry	2078	Stickney Creek	2340
Cow Island	2082	Craig	2343
Snake Point Island	2087	Little Prickly Pear Creek	2348
Snake Creek	2089	Holter Dam	2351
Bird Rapids	2096	Oxbow Bend	2358
Lone Pine Rapids	2103	Cottonwood Creek	2362
Dauphins Rapids	2109	Beartooth Rapids	2365
Gallatin Rapids	2113	Elkhorn Creek	2367
Holmes Rapids	2119	Mann Gulch	2368
Judith River	2124	Picnic Gulch	2370
Drowned Mans Rapids	2126	Gate of the Mountains	2372
Pablos Rapids	2137	American Bar	2373
Steamboat Rock	2142	Hauser Lake Dam	2380
Coal Banks Landing	2170	Prickly Pear Creek	2381
Loma	2190	Stubbs Ferry	2390
Marias River	2190	French Bar	2395
Brule Bar	2196	Canyon Ferry Dam	2398
Fontanelle Bar	2197	Townsend, Mont.	2432
Fort Benton	2212	Deep Creek	2435
Highwood Creek	2237	Cow Creek	2445
Portage Coulee	2242	Toston	2447
Belt Creek	2244	Gallatin River	2474
Morony	2245	Three Forks	2475
Great Falls	2249		

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 518

THE MONTANA POWER COMPANY, a corporation,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Federal Power Commission (R. 54-98) is reported at 77 P.U.R. 299. The opinion of the Court of Appeals (R. 1670-1676) is reported at 185 F. 2d 491.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1950 (R. 1683). A petition for rehearing, filed on October 18, 1950 (R. 1677), was denied on November 1, 1950 (R. 1681). The petition for a writ of certiorari was filed on January 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 313(b) of the Federal Power Act.

QUESTIONS PRESENTED

1. Whether the Missouri River, at the sites occupied by six hydroelectric developments owned and operated by The Montana Power Company constitutes "navigable waters" as defined in Section 3(8) of the Federal Power Act.

2. Whether The Montana Power Company occupies public lands at its Hauser and Hebgen developments "under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920" within the exception contained in Section 23(b) of the Act.

STATUTES INVOLVED

The pertinent provisions of the Federal Water Power Act (41 Stat. 1063, as amended by 49 Stat. 838, 16 U.S.C. 791a *et seq.*) and of the Act of February 15, 1901 (31 Stat. 790, modified by 33 Stat. 628, 16 U.S.C. 79, 522, 43 U.S.C. 959) are set forth in the Appendix, *infra,* pp. 35-38.

STATEMENT

The petition in this case seeks further review of that portion of the order of the Federal Power Commission (Commission), issued on December 7, 1948, requiring The Montana Power Company (Company), petitioner herein, to file applications for license under the Federal Power Act for seven [1]

[1] The Commission's order, as issued, applied to the Company's nine developments. As to one of these projects, Madison, however, the Company has never questioned the necessity of a FPC license; the Company admits that that project

hydroelectric developments which the Company owns and operates in the watershed of the upper Missouri River (R. 99-105).[2]

In so far as here pertinent, the Commission in its order held that the 263 mile reach of the Missouri River between Fort Benton (mile 2212[3]) and Three Forks (mile 2475) both in the State of Montana, on which six of the developments here involved (Morony (mile 2245), Ryan (mile 2249), Rainbow (mile 2254), Black Eagle (mile 2258), Holter (mile 2351), Hauser (mile 2380))[4] were located, constituted "navigable waters" as defined in Section 3(8) of the Federal Power Act, *infra*,

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occupies public land without a permit (R. 79) and had applied to the Commission for a license therefor (R. 60). The remaining project, Canyon Ferry, was purchased from the Company by the United States in 1949, subsequent to the filing of petition for review; the remand below of that phase of the case to the Commission for further consideration in light of these changed circumstances, the Company concedes (Pet. 2), is not a ground for certiorari although the Company does reserve the question should certiorari be granted (Pet. 2).

[2] The proceedings leading up to the issuance of this order were begun by a show cause order issued by the Commission on July 27, 1943, why the Company should not apply for appropriate authorization for these developments (R. 12-14). Extensive hearings were held before a Trial Examiner and the Company was permitted to file exceptions to his report and orally to argue the case before the Commission (R. 61).

[3] "Fort Benton (mile 2212)" indicates that Fort Benton is 2212 miles from the mouth of the Missouri River, that is, from where the Missouri River joins the Mississippi River above St. Louis, Missouri.

[4] Each of these developments includes a dam across the River, a reservoir, a powerhouse and incidental works (R. 55).

p. 35 (R. 101-104, 61-78), and that since the Company made no claim to authorization so to obstruct the River,[5] licenses therefor were required (R. 105). Further, as to the Hauser project and the seventh development here involved, Hebgen, which is located on the non-navigable Madison River,[6] the Commission rejected the Company's claim that by virtue of permits issued to its predecessors in interest by the Secretaries of Agriculture and Interior prior to 1920, but never transferred to it in accordance with applicable regulations, its occupancy of public lands at these developments was "under and in accordance with the terms of a

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[5] Before the Commission and the court below, the Company claimed as to Holter that the permit which had been issued to a predecessor in interest under the Act of February 15, 1901 (31 Stat. 790), a public land right-of-way statute (*infra*, pp. 37-38) and which, the Commission found had been validly transferred to it (R. 81-82) authorized it also to occupy navigable waters. Both the Commission and the court below rejected that contention (compare the 1901 Act with River and Harbor Act of March 3, 1899 (30 Stat. 1121, 1151; *United States* v. *Arizona*, 295 U.S. 174) and the Company has now apparently abandoned that claim. In its petition, however, the Company attempts to reserve a question as to statutory authorization for Holter to occupy navigable waters (Pet. 17, fn. 8), but this reservation comes too late; the Company had not raised this issue in its application for rehearing before the Commission (R. 106, 126-130) or in its Petition for Review (R. 2, 7). Section 313(b) of the Federal Power Act; cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649.

[6] Hebgen consists of a dam and reservoir but no generating facilities and is located about 110 miles up the Madison River, which joins the Gallatin and Jefferson Rivers at Three Forks, Montana, to form the Missouri River (R. 59).

permit or valid existing right-of-way granted prior to June 10, 1920" (Section 23(b) of the Act, *infra,* pp. 35-36); the Commission, accordingly, held that these projects were not exempt from the licensing provisions of the Act (R. 103-104, 82-92). The Commission finally held, as an additional basis for requiring licensing, that the Company's developments, particularly when they were operated as an integrated unit, affected the navigable capacity of the Missouri River below Fort Benton (R. 104-105, 93-98).

The Court below affirmed the Commission's order, holding (1) that the Missouri River above Fort Benton constituted "navigable waters" and (2) that the Company did not have authorizations to occupy public land at Hauser and Hebgen exempting them from the licensing requirements of the Act (R. 1671-1676). The facts relevant to these issues, as found by the Commission, which in most respects are undisputed, may be summarized as follows:

A. *Navigability of the River:* The Missouri River is formed by the confluence of the Madison, Jefferson and Gallatin Rivers at Three Forks (mile 2475) in southwestern Montana (R. 64). Generally, it flows northeasterly to a point about 30 miles beyond Fort Benton, and thence easterly to southeasterly to its confluence with the Mississippi River near St. Louis (R. 64). From Three Forks to Stubbs Ferry (mile 2390) the River runs

for about 85 miles with a tolerably uniform fall averaging five feet per mile (R. 1387). At Stubbs Ferry the Missouri enters "a nearly continuous canyon section" (R. 1387) which extends for 74 miles to Cascade (mile 2316) with an average fall of 3.8 feet per mile; in this reach are the Hauser and Holter Dams (R. 71). This is followed by the Long Pool "a name descriptive of its character" (R. 1388) with a fall of 0.5 feet per mile, having a length of 55 miles and ending at the mouth of Sun River (mile 2261) (R. 71). For the next 17 miles to the mouth of Belt Creek (mile 2244) the River drops 520 feet in passing through the Great Falls of the Missouri, in which are located the Company's Black Eagle, Rainbow, Ryan and Morony Dams (R. 65, 55). For the 32 miles below Belt Creek to Fort Benton, the average fall is 5 feet per mile (R. 71).

Actual Use: For the steamboats which came up the River from St. Louis, the Great Falls presented a natural barrier (R. 65). As a result, Fort Benton was sometimes labelled the "head of navigation," and until 1888, when the advent of the railroads curtailed the demand for water transportation, steamboat traffic up to Fort Benton flourished (R. 64-65, 543-558, 1014-15, 1434). The record shows, however, that three steamboats from Fort Benton successfully navigated the River to points more than 30 miles upstream from Fort Benton and back (R. 65, 215-216, 1013, 1141-1142,

1207, 1450). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft; for this upper part of the River, the "foot of navigation" was sometimes placed just above the Falls (R. 1207; Ex. 17(a) (1880), p. 1474).

Before 1900, there was considerable use of the 263-mile reach of the River above Fort Benton, the Falls always requiring a portage around them. A number of exploratory and Government survey trips were made in manually-powered crafts of various sizes, notably the 1805 expedition under Lewis and Clark, whose party made a successful ascent to Three Forks and beyond (R. 64-65, 1357-1383, 1549-1575). In 1872, Thomas P. Roberts, an engineer for the Northern Pacific Railroad, in the course of a survey of this part of the River, descended the River from Three Forks to Fort Benton in a skiff (R. 66, 1147-1208).[7] In addition, Hubert Howe Bancroft's (1890) "History of the Pacific States" records the use of the River between Stubbs Ferry (mile 2390), about 85 miles below Three Forks, and Fort Benton for the transportation of large numbers of miners returning to

[7] Roberts concluded that the River above Fort Benton could be relied upon for navigation without improvement and his report supported a plan for a steamboat link between Fort Benton and Three Forks, trans-shipping freight around the Falls (R. 66, 1195-99). The Roberts' report was regarded as so useful that the Secretary of War approved its publication for use of the Army Engineers (R. 1147).

the States following the 1864 discovery of gold where Helena is now located; according to Bancroft, a stage line was established to carry passengers from Helena to a point on the River whence was operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (R. 66-67, 1415-1419).[8] This use of the River apparently started soon after the 1864 discovery of gold in Helena, probably diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted; clearly, however, the business was lively around 1866-1867 (R. 67).[9]

Between 1867 and 1900, there was extensive intrastate use of the River between Stubbs Ferry and Great Falls for the downstream transportation of loose logs and large rafts of lumber (R. 66, 417-418, 1142-1146, 1209, 1224-1228, 1263-1265, 1328-1329). Also, several small steamboats were placed on the River above the Falls, for the most part in the period after the close of the navigation era below Benton (R. 66). This operation con-

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[8] Although no description of these boats is available, it seems certain that they were manually-powered and probably were large sharpened bateaux (R. 67).

[9] Bancroft's account is confirmed (1) by advertisements of the boat service in contemporary Helena newspapers (R. 67, 1417, 1139-1141, 1210), and (2) by an 1867 legislative grant of an exclusive privilege for a portage-toll road to the Missouri River Falls Wagon Road Company (Mont. Laws, Territory, 1867, 4th Reg. Sess., p. 109.) (R. 67)

tinued until around 1900 and was confined principally to the 55-mile stretch known as "Long Pool," located immediately above the Great Falls (R. 66, 391-397, 563-564, 1313-1315, 1323-1327, 1343, 1354, Ex. 17(b) (1892) p. 1906, (1895) p. 2227, (1898) p. 1850). Some steamboats were engaged in the local, commercial carrying of freight and passengers (R. 66).[10]

Suitability for Use: From Three Forks to Fort Benton, except in the Falls section, there was a sufficient quantity and depth of water during most of the navigation season, beginning about April 15 and ending about November 1, to support the light-draft navigation formerly customary on the upper reaches of Western Rivers (R. 70; Item F, p. 671, 733).

As to the adequacy of the channel, the Commission noted that between Three Forks and Stubbs Ferry, the River varied in width from 250 to 600 feet; between Stubbs Ferry and Great Falls, from 200 to 1000 feet (R. 70, 1182-1197, 1193-1195). From Three Forks to Great Falls, there existed a low water depth of not less than 2.5 feet, except in 15 places of which only five were below two feet (R. 70), the least low-water depth found was 1.4

[10] The Annual Report of the Chief of Engineers for the Year 1901 (Ex. 17(b)) combining figures for traffic between Great Falls and Cascade with those for traffic between Cascade and Stubbs Ferry shows a total of 2,528 tons of freight and 11,175 passengers carried (p. 2394).

feet (R. 70, 1182-1193). As to the reach between the Falls and Fort Benton, Roberts, in his survey (*supra,* p. 7), found no depth less than two feet and Captain Maguire of the Army Engineers reported in 1883 that it might be navigated although its slope would render navigation difficult (R. 70-71; Ex. 17(a) (1883), p. 1342).

The Commission found that, outside of the Falls section, the average slope did not exceed five feet per mile (see p. 6, *supra*). In addition, while the current was swift at points between Fort Benton and Three Forks, it was not so excessive as to preclude navigation (R. 71); War Department examinations revealed the swiftest current to be no more than five miles per hour (R. 71, Ex. 17(a) (1880), p. 1474), less than at points in the Ohio River.[11] The only serious obstructions between Fort Benton and Three Forks, excepting the Falls section, were Half-Breed and Beartooth Rapids and while there are many accounts of actual passage through these Rapids, no boat met with disaster here—a marked contrast with the numerous wrecks which occurred

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[11] Roberts in his report compared conditions with those on the Ohio River, saying:

> At but few points is the current as swift as it is in Glass-House Ripple, below Pittsburgh, where it is over seven miles an hour at times, or as swift as it is at Letart's Falls, two hundred and thirty-two miles below Pittsburgh. [R. 71, 1203-1204.]

in the clearly navigable lower Missouri River (R. 71-72, 1008-1013).

The Commission further found that the characteristics of the River were such that relatively little improvement would be required to obtain an unobstructed 2.5 foot channel permitting light-draft navigation from Fort Benton to Belt Creek below the falls and from the mouth of the Sun River above the falls to Three Forks (R. 72). An 1880 War Department plan for improvement above Great Falls would have provided a channel three feet deep at low water from Great Falls to Cascade and a 2.5 foot channel thence to Stubbs Ferry; as finally revised in 1898, the cost of the project of 130 miles was estimated as $213,646.50 (R. 72, Ex. 17(c) (1915), pp. 1896-1897). Similarly, Roberts' 1872 proposal for a narrow-gauge rail link, including the cost of two steamers above the Falls, was estimated at $247,800 (R. 72, 1195-1199).

Improvements Above Fort Benton: In 1880, Army Engineers expended about $15,000 for rock removal and construction of wing dams at and near Beartooth and Half-Breed Rapids (R. 73, Ex. 17(a) (1881), pp. 1671-1672).[12] Later, by the River and Harbor Act of August 18, 1894 (28

[12] Earlier, in 1878-1879, private operations by The Montana Navigation Company had accomplished some removal of rocks and construction of wing dams (Ex. 17(a) (1881), p. 1671; R. 1250-1251).

Stat. 338, 358), Congress extended the upper limits of the River under improvement to Stubbs Ferry, directing that $20,000 be expended between the Falls and Stubbs Ferry (R. 73-74). Between 1895 and 1899, $65,933.73 was expended in removing obstructions and constructing wing and closing dams (R. 74, Ex. 17(c) (1915), pp. 1896-1897). Operations were suspended in 1899 because of lack of funds and absence of incentive to further improvement (R. 74, Ex. 17(c) (1915), p. 1897). Appropriations for work above the Falls ceased with the Act of June 3, 1896 (29 Stat. 202, 231-232) (R. 74).

Congressional Assertion of Jurisdiction: Congress authorized and directed surveys and examinations of the River between Fort Benton and Three Forks, and the resulting reports of the Army Engineers consistently reflected its navigable status (R. 75, 1383-1393, Ex. 17(b) (1891), pp. 3733 *et seq.;* Ex. 17(b) (1894), p. 1780; Ex. 17(a) (1880), pp. 1473-1474). Also in the River and Harbor Act of July 13, 1892 (27 Stat. 88), Congress directed the War Department to make an examination of the River from Three Forks to Canyon Ferry to determine at what points, if any, use might be made of water power for manufacturing or other purposes, "without unreasonably impairing the navigability of that portion of said river." (R. 75) Furthermore, as already mentioned, *supra,* this page, Congress extended the up-

per limits for improvement of the River to Stubbs Ferry and appropriated funds for use in making improvements (R. 75). In addition, Congress repeatedly recognized the Missouri River as a navigable water of the United States in authorizations for construction of dams at various points all the way from Fort Benton to Three Forks,[13] and in each instance it made express provision for protection of interests of navigation.

B. *Claimed Authorizations to Occupy Public Lands.* (a) *Hauser:* The Company's claimed authorization to occupy public lands at Hauser is based on two permits issued in 1907 to Helena Power Transmission Company (Helena), the company which began construction of the Hauser Dam in 1905 (R. 83). One permit was issued to Helena in January 1907 by the Secretary of the Interior for a right-of-way over certain of the public lands involved "in accordance with the provisions of the act of February 15, 1901—31 Stat. 790—and the regulations present or future thereunder" (R. 83). This permit contains no provision allowing its transfer or assignment but in regulations approved by the Secretary of the Interior on August 24, 1912 (41 L.D. 150, 170), it was provided that a permit may be transferred upon conditions there specified "and not otherwise" (R. 84). The

[13] Act of February 20, 1907 (34 Stat. 912); Act of April 12, 1906 (34 Stat. 111); Act of April 28, 1904 (33 Stat. 570); Act of June 8, 1894 (28 Stat. 91); Act of June 3, 1896 (29 Stat. 202, 231-232).

second permit was for the other public lands at Hauser and was issued to Helena in March 1907 by the Department of Agriculture.[14] This permit on its face states that it "shall not be transferable" and is "terminable at the discretion of the Forester" (R. 83). Succession to another's benefits under this permit required surrender of the original permit whereupon the Agriculture Secretary in his discretion might issue a new permit for the remainder of the term (Regulation L-16. Use Book, Department of Agriculture (1911) pp. 32-33) (R. 85).

The Company acquired possession of these permits in the following manner: In 1909, Helena was merged with United Missouri River Power Company which in 1906 had acquired all of its capital stock (R. 83). Through a foreclosure sale all of the assets of the United Missouri River Power Company was acquired by the Missouri River Electric and Power Company whose capital stock was shortly thereafter in turn acquired by the Butte Electric and Power Company (R. 83). On December 12, 1912, the latter company and its several wholly-owned subsidiaries, including Missouri River Electric and Power Company, were merged into The Montana Power Company, which had been formed for that purpose (R. 83). In

[14] The Act of February 1, 1905 (33 Stat. 628) transferred to the Secretary of Agriculture authority under the 1901 statute to issue such permits for use of lands within forest reserves. See 36 L.D. 579, 581; 32 Op. A. G. 525, 527.

neither case was any effort made by the Company to obtain the transfer of these permits to it in its own name. Neither permit has been cancelled or revoked; and the Company has paid the annual rentals due on the Agriculture permit since its organization in 1912, and on the Interior permit since 1930, when such payments were first required (R. 989-990).

(b) *Hebgen:* The Company's claimed authorization to occupy public lands at Hebgen is based on two permits issued by the Secretary of Agriculture in 1914 and 1915 respectively to the Montana Reservoir and Irrigation Company (Reservoir Company) which had been organized in 1906 for the purpose of constructing and operating Hebgen. One permit issued to Reservoir Company under the 1901 land-permit statute *supra,* p. 13, *infra,* pp. 37-38, was a Final Power Permit covering 13,415.5 acres of public land flooded by the Hebgen Reservoir (R. 91-92); Article 4 of this permit expressly allows its transfer under conditions therein specified "and not otherwise"; no transfer could be made without the prior approval of the Secretary to whom was reserved the power to impose upon the transferee "new and additional conditions" (R. 92).[15] The second Agriculture permit

[15] The full text of Article 4 reads:

> This Permit and the permission granted hereunder to occupy and use National Forest lands may be transferred to a new Permittee under the following conditions, and not otherwise: The proposed transferee shall

was granted to Reservoir Company in October 1915 and covered an additional 84.5 acres of public land occupied by a "camp site." This permit specifically provided that it "is not transferable" (R. 92). The Company acquired possession of these permits in May 1934, when it acquired all of Reservoir Company's property in exchange for the latter's outstanding stock which the Company had held since as early as 1916 (R. 92). Neither of these permits has been revoked or cancelled, nor has the Company sought or obtained the approval of the Secretary of Agriculture for their transfer (R. 92). The Company, however, has since 1935 paid the annual rentals due under the Final Power Permit (R. 989).

ARGUMENT

1. (a) The Commission's holding that the portion of the Missouri River here involved is a

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file with the District Forester of the District in which the lands to be occupied are situated the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of a stipulation binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the Permittee, subject, however, to such new and additional conditions as shall have been embodied in such stipulation and so approved. [R. 1101-1102.]

"navigable water" as defined in Section 3(8) of the Act fully satisfies, we submit, the criteria for determining navigability which are there set out and which have been judicially applied prior to, as well as in, *United States* v. *Appalachian Power Co.*, 311 U.S. 377. Clearly, even the upper Missouri River is more navigable than portions of the New River involved in the *Appalachian* case.

Section 3(8) of the Federal Power Act defines "navigable waters" as follows:

> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

As was stated in the *Appalachian* case, "use of a stream long abandoned by water commerce is

difficult to prove by abundant evidence." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 416. The Commission however did find—and these findings are supported by substantial evidence and hence conclusive here (Section 313(b) of the Act) —that the River was used for through transportation by Lewis and Clark in 1805 (*supra*, p. 7), by Roberts, the Northern Pacific engineer, in 1872 (*supra*, p. 7), and by a commercial company carrying gold miners back to the States from Helena in the late 1860's (*supra*, pp. 7-8).[16] The

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[16] The Company attacks the Commission's finding as to the use of the River for transportation of miners because based principally on a historical treatise and contemporaneous disinterested newspaper advertisements, which, the Company asserts, is inadmissible hearsay (Pet. 8-9; 29). But in recognition of the great difficulty of proving ancient facts (cf. *United States* v. *Appalachian Power Co.*, 311 U.S. 377), this Court has permitted the relaxation of common law rules of evidence to permit the introduction of such trustworthy historical materials. *The Montello*, 20 Wall. 430, 440-442 (historical treatise and newspaper advertisements relied on to establish ancient use of the River); *Economy Light Co.* v. *United States*, 256 U.S. 113, 117; *Arizona* v. *California*, 283 U.S. 423, 453, fn. 3; 5 Wigmore, *Evidence* (3rd Ed.) Secs. 1422, 1597, 1598. Moreover, even if these materials were inadmissible under the technical rules of evidence, the Commission was not precluded from admitting such evidence (see Section 308(b) of the Act, 16 U.S.C. 825g(b); cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229-230) and from placing some reliance upon such evidence in arriving at its conclusions when, as here, the Commission finds it to be of substantial and probative value. Cf. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 155; *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F.2d 155 (C.A. D.C.), certiorari denied, 315 U.S. 806; *Wisconsin Public*

Commission also found that above the Great Falls there had been substantial use of the River both for commercial and pleasure boats as well as for floating logs and lumber, and that below the Falls, several steamboats had sailed almost up to the Falls. These findings fully support the Commission's finding of navigability based on actual use (R. 67-68) for it is settled that the actual use of a stream by any kind of vessel (*The Montello,* 20 Wall. 430, 442) or even for the floating of logs may serve to establish its status as a navigable water of the United States. *United States* v. *Appalachian Power Co., supra,* at 405; *Wisconsin Public Service Corp.* v. *Federal Power Commission,* 147 F. 2d 743, 747 (C.A. 7), certiorari denied, 325 U. S. 880. The fact that the River's use for such transportation was for but a short period of time and has long since ceased is immaterial (*Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 118, 123-4; *Arizona* v. *California,* 283 U. S. 423, 453-4; *United States* v. *Appalachian Power Co., supra,* at 408), particularly where, as here, the use of the River ceased because of the advent of the railroads. *United States* v. *Appalachian Power Co., supra,* at 413.

Also supporting the Commission's conclusion that the River was navigable is the finding that the

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Service Corp. v. *Federal Power Commission,* 147 F.2d 743 (C.A. 7), certiorari denied, 325 U.S. 880; *Georgia Power Company* v. *Federal Power Commission,* 152 F.2d 908 (C.A. 5).

River was suitable for use in interstate commerce both in its natural and improved condition—the second criterion of navigability set out in Section 3(8), *supra*, p. 17. This test is much broader than "the actual use" test and embraces susceptibility or capability of use for transportation and commerce whether or not there has been any actual use. *United States* v. *Utah*, 283 U. S. 64, 82-3; *Economy Light & Power Co.* v. *United States*, *supra*, at 122, 123; *The Montello*, *supra*, at 441-3. Here, the Commission considered the physical characteristics of the River, set forth in the statement (pp. 5-6, 9-11, *supra*), and pointed to a War Department plan, finally revised in 1898, for providing a channel of not less than 2.5 feet deep at a cost of $213,646.50, together with an inexpensive narrow-gauge rail link around the falls (*supra*, p. 11). These findings, together with the finding as to actual use of the River both above and below the Falls, even assuming *arguendo* that use to have been purely intrastate and non-commercial,[17] clearly support the Commission's conclusion that with a land carriage around the Falls, the River was suitable for use for purposes of commerce in a natural state or with reasonable low cost

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[17] "Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *United States* v. *Appalachian Power Co.*, *supra*, at 416.

improvements (R. 72).[18] Cf. *The Montello, supra; United States* v. *Appalachian Power Co., supra,* at 417-419.[19]

(b) The Company claims that since the Great Falls preclude literal through use of the River and thus prevent it from forming an unbroken highway, the portion of the River here involved could not be a "navigable water" of the United States (Pet. 3, 22). But while no stream can by itself con-

[18] The Company suggests that the only useful improvement would cost $1,300,000,000 and that at present such an undertaking would be unjustified (Pet. 21-22). This project would involve the improvement of the River from Sioux City, Iowa (mile 768) to Three Forks to a commercial depth of nine feet (see R. 73) which the Company's experts characterized as "fantastic" (R. 661), "ridiculous" (R. 828), and "preposterous" (R. 857). But, as pointed out in the text no such elaborate improvement is necessary to make the portion of the River here involved more easily usable by light-draft boats. Moreover, the determination whether a navigation improvement is justified is not restricted to an evaluation of current or prospective economic considerations and commercial conditions, it being required only that there be a balance between cost and need "at a time when the improvement would be useful." *United States* v. *Appalachian Power Co., supra,* at 407-408.

[19] Also supporting the Commission's conclusion is the evidence of navigability in the authorizations by Congress for improvements (*supra,* p. 12); Section 3(8) includes as navigable waters:

> * * * such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority

The Commission's reference to these authorizations to support its conclusion is not, as the Company claims (Pet. 26), con-

stitute an unbroken highway if at any point a land carriage or portage is necessary, such a condition is not a prerequisite to a finding of navigability. This is clear from the Act's definition of "navigable waters" which expressly includes "all falls, shallows, or rapids compelling land carriage" where the stream is used or suitable for use despite such interruptions between the navigable parts. And this definition is in accord with established principles. In *The Montello,* 20 Wall. 430, this Court rejected the lower court holding that the Fox River was not navigable by reason of "several rapids and falls" and concluded that it had always been navigable in fact, saying (20 Wall. at 442-443):

> the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation.

In the *Economy Light Co.* case, the Court stated that (256 U.S. at 122):

> navigability, in the sense of the law, is

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trary to *Oklahoma* v. *Texas,* 258 U.S. 574. Here, unlike *Oklahoma* v. *Texas,* the inference of navigability from the improvements is not "overcome by the actual conditions disclosed in the course of the work" (258 U.S. at 590) or, indeed, by the other findings of the Commission.

> not destroyed because the watercourse is interrupted by occasional natural obstructions or portages * * *.

And the *Appalachian* case declares that (311 U.S. at 408-9) "There never has been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries, or shifting currents."

In the instant case, the interrupting Falls cover a 17-mile section, never navigated in fact, and require a portage of about 18 miles (R. 69). But, as shown *supra,* pp. 7-8, many trips along the River were made via portage around the Falls. Such an interruption does not sever the upper 214 miles of the Missouri from the lower 2,244, but rather is merely an obstruction notwithstanding which the River was used as a continued highway in interstate commerce at least as far upstream as Stubbs Ferry. Cf. *The Daniel Ball,* 10 Wall. 557, 563; *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F.2d 155, 161 (C.A.D.C.), certiorari denied, 315 U.S. 806. It follows that the presence of the Falls does not destroy the River's status as a navigable water of the United States.[20]

[20] Even if the Act's definition of navigable waters does not fully correspond with established judicial criteria, Congress clearly has the power, and the legislative history plainly indicates that it intended to exercise it (H. Rep. No. 910, 66th Cong., 2d Sess., p. 7), to regulate waters in such an interrupting reach of a navigable stream. Otherwise, its admitted power to regulate lower navigable portions of the stream could be destroyed through the location of obstructions in the interrupting reach.

(c) The Company finally claims that Congress abandoned navigability of the upper Missouri River when it passed the River and Harbor Act of 1935 (49 Stat. 1028) authorizing the construction of the Fort Peck Dam located at mile 1869, about 375 miles below the Company's lowermost development, "in accordance with the plans recommended in" H. Doc. No. 238, 73d Cong., 2d Sess. and "subject to the conditions set forth in such documents" (49 Stat. 1028, 1034). The document referred to contained the District Engineer's report, which expressed opinions, upon which petitioner relies, to the effect that the reservoir at Fort Peck would render the section of the river from the Fort Peck Reservoir site to Fort Benton, Montana, nonnavigable. House Doc. No. 238, 73rd Cong., 2d Sess., pp. 268, 269 (Pet. pp. 5, 27).[21]

But the congressional authorization adopted only the plans and conditions specified in the House Document, not the opinions of the District Engineer, which apparently are not shared by his superiors,[22] and which subsequent events have

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[21] The Company also points to the later authorization by Congress of the "Pick-Sloan" plan, providing for additional dams downstream; as these are constructed, the Company argues, the head of navigation will be pushed farther downstream (Pet. 5).

[22] The Chief of Engineers in concurring with the District Engineer's "general plan of improvement," recommended that "the reservoir at the site of Fort Peck be built to the

shown to be incorrect.[23] The congressional authorization to construct Fort Peck thus clearly does not contain any explicit legislative declaration which has traditionally been regarded as necessary for surrendering sovereign authority in regard to a matter of public concern. *Brown* v. *Duchesne,* 19 How. 183, 195; *Belmont Bridge* v. *Wheeling Bridge,* 138 U.S. 287, 292-293; *Louisville & Nashville R.R.* v. *Kentucky,* 161 U.S. 677, 685-686. When Congress has intended to declare a stream not navigable in the past, it has done so explicitly. Cf. Act of March 23, 1900, c. 88, 31 Stat. 50, and Act of February 27, 1915, c. 68, 38 Stat. 816, and other statutes collected in 33 U.S.C. 21-55.

Nor has the mere presence of a dam, although without locks, prevented the courts from holding

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maximum practicable capacity; and be operated primarily for navigation." House Doc. No. 238, *supra,* p. 12. In addition, in the course of the Commission hearing, the Chief of Engineers advised the Commission that, in the view of the Corps of Engineers, the Missouri River is a navigable water of the United States from Stubbs Ferry—if not Three Forks—to its mouth, and that the construction of Fort Peck Dam had not affected the jurisdiction of the War Department with respect to the navigable status of the Missouri River above that dam (R. 1648-1649).

[23] The map contained in the petition (p. 10) shows that the Fort Peck Dam has created a reservoir many miles in length which may well have improved navigation above the dam. As late as 1947, the Department of the Army reported that "depths which will accommodate large boats are available on the Fort Peck Reservoir and drafts of 22 inches are practicable from the reservoir to Fort Benton" (Ann. Rep. Chief of Engineers (1947), p. 1541).

a stream to be navigable at and above the site of the dam (*Wisconsin Public Service Corp.* v. *Federal Power Commission,* 147 F.2d 743 (C.A. 7), certiorari denied, 325 U.S. 880; *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F.2d 155 (C.A.D.C.), certiorari denied, 315 U.S. 806), and the presence downstream of a barrier, even if it be a licensed dam, has not barred the conclusion that an upstream dam is located in a navigable water (*id.* at 161). Interstate freight may be carried on a dammed-up portion of a navigable stream whether or not an uninterrupted through passage on the river is possible. *Cf. The Daniel Ball,* 10 Wall. 557. Moreover, Congress has power to provide subsequently for passage of boats or freight around the dam—or for that matter to remove the dam—should future transportation circumstances provide justification. The dam thus does not deprive the stream of its navigable status.

2. The Commission, we submit, properly held that the Company's occupancy of public lands at its Hauser and Hebgen developments was not "under and in accordance with the terms of a permit or valid right-of-way granted prior to June 10, 1920," and hence not exempted, by the exception in Section 23(b), from the licensing requirements of the Act. Although permits sanctioning the occupancy of these lands were issued by the Secretaries of Agriculture and Interior prior to

June 10, 1920,[24] these permits were issued not to the Company but to the Company's predecessors in interest. *Supra,* pp. 14-16. Since these permits were personal to the permittee [see Act of February 15, 1901 (31 Stat. 790) (authorizing the issuance of these permits); 36 L.D. 579, 580, 41 L.D. 150, 152; 532, 534 (Interior regulations); *In re Southern California Edison Company,* 7 F.P.C. Ann. Rep. (1927) 142, 147], as is plainly shown on their face, *supra,* pp. 14-16, they could be transferred, if at all,[25] to the Company only upon due

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[24] The Company's claim that the Commission was without power to pass upon these permits in the absence of the Secretaries of Agriculture and Interior (Pet. 6, 8) misconstrues the Commission's action. The Commission's order does not invalidate the permits but rather merely holds that in the circumstances of this case the Company's possession of these permits does not operate to exempt these projects now operated by it, rather than by the original permittees, from the licensing requirements of the Act. Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 271; *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350. Moreover, although copies of the order fixing the date of hearing as well as subsequent orders were sent to the departmental Secretaries, no one from their Departments sought to participate in the proceedings. Finally, as the court below points out, "the Commission * * * adequately represented the United States therein. The Secretaries were at most proper parties. Their failure to participate does not invalidate the order." (R. 1676.) Cf. *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 403.

[25] Although the Hauser-Agriculture permit stated on its face that it "shall not be transferable" (see *supra,* p. 14), the regulations of the Department of Agriculture permitted succession, subject to the approval of the Secretary of Agri-

compliance with the procedure prescribed by the issuing Secretaries. See, *e.g.*, Section 19 of the Interior Regulations, 41 L.D. 150, 170;[26] Forest Service Use Book 1907, p. 43; 1908, p. 55, and 1911, pp. 32, 33.[27] In these circumstances the Company's admitted failure to comply with the terms of the permits by refusing to seek the approval of the departmental Secretaries for such transfers (R.

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culture. See fn. 27, *infra*. The Hebgen "camp site" permit was not transferable, *supra*, p. 16.

[26] Regulation 19 (41 L.D. 150, 170) provided a complete mechanism of the transfer from one party to another:

> A final permit may be transferred to a new permittee under the following conditions and not otherwise: The proposed transferee shall file with the Director of the Geological Survey, Washington, D. C., the decree, execution of judgment, will, proposed contract of sale, or other written instrument upon which the proposed transfer is based, or a properly certified copy thereof, also an application by the proposed transferee in the form of an agreement binding the proposed transferee to the performance of such new and additional conditions expressed therein as the Secretary may deem necessary; and thereupon the Secretary may, in his discretion, approve in writing the proposed transfer, and after such approval the transferee shall succeed to all the rights and obligations of the permittee, subject, however, to such new and additional conditions as shall have been embodies in such agreement and so approved.

[27] Regulation L-16 of the Use Book, Department of Agriculture (1911) pp. 32-33, provided that:

> Upon the presentation to the Secretary of Agriculture of certified copies of sale, lease, assignment, execution of judgment, or other form of transfer of

1491)[28] fully supports the Commission's ruling that the Company's possession of these permits does not operate to exempt its occupancy of public lands at these developments from the licensing requirements of the Act.

In addition, there is no merit to the Company's contention that since it had been closely affiliated

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> the properties or other right of the permittee in and to the works constructed under a water-power permit and of the water or other rights necessary to the enjoyment of the use of said works, the said Secretary may, in his discretion, upon the formal surrender of the original permit and the filing of a stipulation satisfactory to the said Secretary by the purchasers, transferees, executors, successors, lessees, or assigns of the original permittee, issue a new permit for the unexpired term of the original permit to such purchasers, transferees, executors, successors, lessees, or assigns, authorizing him, it, or them to occupy and use the lands of the United States specified in the original permit for the purposes named in the original permit.

See also *supra*, p. 15, fn. 15.

[28] The reason for the Company's failure to apply for the transfer of these permits to it when it was organized in 1912 appears to have been that it desired to avoid "bringing the company under new regulations promulgated in August 1912, by the Secretary of the Interior, which Kelley [counsel for one of the organizers] considered absurd and objectionable. He stated that they required a permittee, at the request of the Secretary of the Interior, to surrender the permit to the United States or transfer it to such State or municipality as the Secretary might designate. According to Kelley, compensation to the company would be so limited as to exclude 'going concern,' 'contract' and 'undeveloped power site' value." (*Re Montana Power Company*, 4 F.P.C. 213, 228.)

with the permittees, it was beneficial owner of the permits and hence, since it acquired the permits by merger in the case of Hauser and by dissolution of the permittee in the case of Hebgen, no transfer requiring compliance with the departmental regulations was involved. But the Company, having evolved these corporate arrangements for its own purposes, was not free to disregard them when it suited its convenience and thereby to avoid compliance with the departmental regulations. Cf. *Schenley Corp.* v. *United States,* 326 U.S. 432, 437; *Moline Properties* v. *Commissioner,* 319 U.S. 436; *Gray* v. *Powell,* 314 U.S. 402, 414. Furthermore, the chain of possession of the Hauser permits involved an acquisition by foreclosure which unquestionably involved a transfer (R. 998-999), *supra,* p. 14. Similarly, the acquisition of the Hebgen permit was by way of exchange of the permittee's property for its outstanding ~~property~~ stock, which likewise involved a formal transfer, *supra,* p. 16. Moreover, the Company's contention overlooks the personal nature of the permits noted *supra,* p. 27, and the broad scope of definition of transfer contained in the regulations (*supra,* fn. 26, p. 28; fn. 27, pp. 28-29). *In re Southern California Edison Company,* 7 F.P.C. Ann. Rep. (1927), pp. 142-149.

Nor is the Company's position aided by cases such as *Seaboard Air Line Railway* v. *United States,* 256 U.S. 655 (Pet. 28), and *Novo Trading Corp.* v. *Commissioner of Internal Revenue,* 113

F.2d 320 (C.A. 2) (Pet. 28), involving validity of transfers of claims against the Government under Rev. Stat. 3477. These cases do not hold that the acquisition of a claim by merger does not involve a transfer but merely that such a transfer is exempted from the prohibitions of Rev. Stat. 3477. Moreover, there is a fundamental distinction between the prohibition against transfer of claims against the United States contained in Rev. Stat. 3477 and the regulation of a transfer of the privilege granted by the departmental permits. That privilege, conferring, as it does, substantial and important benefits upon the named permittee, requires in return, the undertaking of certain duties and obligations for the fulfillment of which the named permittee is looked to. To protect the public interest and to insure the proper discharge of these obligations, the departmental Secretaries certainly are free to scrutinize every transfer of these permits regardless how achieved.[29]

Finally, the Company claims that the departmental Secretaries recognized it as owner of the permits and hence waived compliance with their

[29] It is interesting to note that in the one instance (Holter) in which the Company applied to the departmental Secretaries for the transfer to it of the public land permit originally issued to its predecessor in interest, the terms and conditions of the permit then issued on April 22, 1920 (R. 1090) were substantially more comprehensive than those in the permits issued to its predecessor and reflected the public awareness of the desirability of more complete control of hydroelectric development upon the public domain (Ex. 6, R. 1072-1091).

regulations (Pet. 27-28). This claim is apparently predicated on the Company's payments of the annual rentals due under the permits (Pet. 7-8). Only in the case of the Hauser-Agriculture permit, however, did the Company pay rentals prior to June 10, 1920. Those payments were made to subordinate regional employees of the Agriculture Department (R. 1542-1543), and there is no showing that these employees were authorized to waive compliance. *United States* v. *City and County of San Francisco,* 310 U.S. 16, 31-32; *United States* v. *California,* 332 U.S. 19, 40. Petitioner paid annual rentals on the Hauser-Interior permit only after 1929 (*supra,* p. 15) and on the Hebgen Final Power permit only after 1934 when it acquired possession of this permit from the Reservoir Company (*supra,* p. 16). By that time the departmental Secretaries no longer had authority to approve transfers of permits since that authority had been withdrawn by the Federal Water Power Act on June 10, 1920 (32 Op. A.G. 525); hence the Secretaries' acceptance of the Company's rental payments could not have operated as a recognition of the Company as the permittee.

CONCLUSION

The holdings of the Commission are supported by substantial evidence and are in accordance with applicable law. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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